No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a ban on commercial speech that is wholly ineffective in promoting a governmental interest when applied to a particular speaker violates the First Amendment to the United States Constitution?

TABLE OF CONTENTS

CITATION OF AUTHORITY

No. 92-486

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts of this case are characterized by their uniqueness. Edge Broadcasting Company ("Edge") owns WMYK-FM, "POWER 94," a 100,000-watt radio station. POWER 94 is licensed by the FCC to Elizabeth City, North Carolina and broadcasts from Moyock, North Carolina, a town about three miles south of the North

Carolina/Virginia border.[1] (JA 180). POWER 94 has a dual identification of Elizabeth City and Virginia Beach, Virginia. Its studios and corporate offices are located in Virginia Beach. (JA 180).

Ninety-two and two-tenths percent (92.2%) of the people comprising POWER 94's listening audience live in Virginia. Seven and eight-tenths percent (7.8%) live in North Carolina. POWER 94's signal reaches nine North Carolina counties but fewer than 2% of all North Carolinians live in these counties. (JA 188-89). The Commonwealth of Virginia operates a lottery;[2] the State of North Carolina does not.

Section 1304 of the United States Criminal Code forbids radio stations from broadcasting any information, prize lists or advertising concerning any lottery. A broadcaster who violates Section 1304 is subject to criminal and regulatory penalties, including imprisonment, fines and license revocation. Under Section 1307, however, radio stations may broadcast material concerning state-sponsored lotteries if the stations are licensed to a location in the lottery state or an adjacent lottery state. Since POWER 94 is licensed to a non-lottery state, it falls within the ban.

North Carolina residents who live within POWER 94's broadcast area listen to broadcasts of Virginia-based radio stations, view Virginia-based television and read

---

[1] Record citations are made to the Joint Appendix filed with the Court of Appeals.

[2] *See Va. Code* § 58.1-4001 (1987), authorizing the Commonwealth to sponsor a lottery.

Virginia newspapers. (JA 188). Seventy-nine percent (79%) of all radio stations whose broadcast signals reach these counties are licensed in Virginia; approximately sixty-two percent (62%) of all radio listening in these counties[3] is directed to radio stations licensed to Virginia. (JA 189).

During a given week in which the Virginia lottery advertises an instant game, for example, the radio stations[4] advertising the lottery air, on the average, 12 lottery advertisements each day and reach, in any given quarter hour of radio, an audience of 4,400 North Carolinians over the age of 18. During a typical advertising period for one instant game, these Virginia stations aired 452 60-second spots advertising the lottery. This type of advertising will run continuously so long as Virginia has a lottery. (JA 190; 39-40). In addition, vast numbers of Virginia advertisers include their affiliation with the lottery in their promotional messages.

The residents of this part of North Carolina are also exposed to Virginia lottery advertising on television, the dominant informational media. The four Hampton Roads area television stations which air Virginia lottery advertising enjoy large audiences in the nine-county POWER 94 service area and beyond.[5] Seventy-five percent of all

---

[3] The counties are Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank and Perquimans. (JA 188).

[4] The stations are: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. (JA 188).

[5] These stations are: WAVY, WVEC, WTKR, and WTVZ. (JA 190).

television viewing in four of these counties is directed to Virginia stations; between 50% and 75% is directed to Virginia stations in three counties; and between 25% and 50% is directed to Virginia stations in two counties. (JA 191-193). With an average of 274 television ads airing during a typical advertising campaign for an instant game, and with lottery news stories broadcast as a matter of course, virtually every North Carolinian living in the part of North Carolina reached by POWER 94's signal is exposed to the Virginia lottery. (JA 191).

The North Carolinians residing in POWER 94's service area are also supplied with Virginia lottery advertising by the Virginia newspapers which serve the area. These papers carry Virginia lottery advertising and circulate approximately 10,400 newspapers daily, 11,250 on Saturday, and 12,500 on Sundays. (JA 196).

Advertising the Virginia lottery is big business, both for the Virginia Lottery Board and for the many private retailers affiliated with the lottery. Excluding the cost of production, for example, the Lottery Board spent $1,202,905.00 on its introductory advertising campaign. It spent a total of $4,354,199.00 to promote its first three instant games. At the time of the trial, it anticipated spending about $2.3 million to introduce its on-line games and about $3 million a year to sustain them. (JA 39-40; 185-86).

Both the Lottery Board and private businesses advertise the lottery extensively in Hampton Roads. The Virginia Lottery Board buys advertising from seven Hampton Roads radio stations, four television stations, and three newspapers. (JA 188, 190, 195). As of the time

of trial, there were approximately 1,414 Hampton Roads businesses selling lottery tickets. Many of these outlets trumpet their status as lottery retailers in their advertising. (JA 41; 196).

Like other Americans, North Carolinians have great appetites for television and radio. Television viewers and radio listeners alternate between various stations. The same people who watch television also listen to the radio and read newspapers. (JA 14-15). In the average American household, the television set is turned on for seven hours and eight minutes per day. (JA 193).[6]

Ninety-nine percent of all American households have radios. In these households, the inhabitants have an average of 5.6 radios per household. Sixty-one percent (61%) of all adults have radios at work and listen to the radio fifty-three percent (53%) of the time. Ninety-five percent (95%) of all automobiles have radios, and seventy-seven percent (77%) of all adults are reached every week by car radio. (JA 194-195). Ninety-six and one percent (96.1%) of all American men and ninety-five and seven-tenths percent (95.7%) of all American women over the age of 18 listen to the radio during any given week.[7]

---

[6] Men watch television on the average of four hours and 14 minutes a day; women, an average of five hours and 12 minutes a day; teenagers, between the ages of 12 and 17, watch an average of three hours and eight minutes a day; and children, between the ages of 2 and 11, watch an average of 3 hours and 40 minutes a day. (JA 194).

[7] American men listen an average of 2.55 hours every day; American women listen an average of 2.53 hours a day. All Americans over the age of 12 listen to the radio for an average of three hours a day. (JA 194-195).

The impact of the laws on POWER 94 was severe. POWER 94 did not broadcast any Virginia lottery information at all because it feared that it would be prosecuted or subjected to administrative penalties. (JA 203-204). It refrained from airing any lottery press releases and any stories containing data on the why, how, when and where of the Virginia lottery because it could not predict what was permissible and what was not. (JA 204-208).

Of the 999 enterprises advertising on POWER 94 as of May 26, 1989, only 17 were located in North Carolina. Since .017% of POWER 94's advertisers live in North Carolina, its economic existence hinges on its ability to attract Virginia advertisers. The law prevented POWER 94 from carrying advertisements for Virginia businesses wishing to advertise their affiliation with the Virginia lottery. (JA 209). POWER 94, therefore, lost advertisers who wanted to include a reference to their affiliation with the Virginia lottery. (JA 161-164). Radio ads are generally prepared and taped in advance, and many POWER 94 advertisers would not alter their advertising copy to delete lottery related messages. (JA 160-164). POWER 94 had to refuse to broadcast such ads.

The government's ban on POWER 94 did not reduce the number of lottery ads broadcast. Advertising budgets are fixed. The advertiser apportions the budget among various competitors. When POWER 94 was not able to accept advertisements, the advertising simply went to another advertiser.

REASONS FOR DENYING THE WRIT

This case stands for the unsurprising proposition that a federal statute which silences one speaker out of many is unconstitutional if it advances no governmental interest whatsoever. The decisions below were based on a detailed factual record which empirically demonstrated the statutes' ineffectiveness in the peculiar situation at bar. What would have been surprising is a holding that the statutes are constitutional as applied even though they are totally ineffective.

The Fourth Circuit's decision is both narrow and *sui generis*. If any other litigant could prove, as Edge did, that a governmental regulation prohibiting it from speaking accomplished no governmental purpose, then the regulation would be unconstitutional as applied to that litigant. Because that factual scenario is exceedingly rare, the Fourth Circuit's decision does not make constitutional challenges more likely to succeed or even more likely to be brought.

It is probably fair to say that the only one who cares about this decision is Edge.[8] The Virginia Lottery has always been able to advertise extensively within the geographic area covered by Edge's signal. Prior to the decision, Edge was required to refuse any advertisement

---

[8] The fact that the decision is narrow is demonstrated by the lack of attention it has received. Neither the district court's opinion (732 F. Supp. 633) nor the Fourth Circuit's unpublished opinion have ever been cited. To Edge's knowledge, no other radio or television station in the United States has instituted suit seeking similar relief.

which mentioned the Virginia Lottery. However, the citizenry still heard the advertisements because they were broadcast by Edge's competitors. After the decision, Edge is permitted to broadcast such advertisements. The decision does not result in more advertising about the Virginia Lottery; it simply means that Edge can now receive a share of the Lottery's advertising budget. Edge's ability to carry lottery advertisements has no effect on any federal policies promoting or discouraging lotteries or promoting or encouraging federalism.

Application of the statute to Edge created a bizarre result. Edge and its numerous competitors reach the exact same audience. Because the competitors were licensed to Virginia, they were free to broadcast that which Edge was prohibited from transmitting. This disadvantaged Edge and advantaged Edge's competitors, but in no way advanced governmental interests. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), this Court held that where a statute banning speech did not directly advance a governmental interest, it was unconstitutional. The courts below did nothing more than apply *Central Hudson* to the facts of this case and reach the only constitutionally permissible result.

1. Application of the *Central Hudson* Test

a. Petitioner argues that the courts below failed to recognize that sections 1304 and 1307 are designed to serve not one interest, but two. Those interests are discouraging lottery participation in states that do not sponsor lotteries *and* accommodating lottery participation and

promotion in states that do. (Petition at 8). What Petitioner fails to note is that the statutes accomplish neither purpose when applied to Edge.

The district court rightly concluded that the goals of the federal laws are only implicated with respect to the 8% of POWER 94's listeners who live in the nine North Carolina counties reached by its signal. *Edge*, 732 F. Supp. at 640. The other 92% of POWER 94's listening audience are, of course, Virginians, who voted to create their own lottery. Narrowed down to these few North Carolinians, the question becomes: Does forbidding POWER 94 from advertising the Virginia lottery accomplish any governmental objective? The stipulated facts answered this question definitively.

Virginia radio and television signals bombard the area of North Carolina served by POWER 94 with Virginia lottery data. (JA 190-191). The Virginia television stations transmit into a larger area of North Carolina than does POWER 94. (JA 190). Sixty-four percent (64%) of all television viewing is directed to Virginia stations which air lottery ads. The district court found that in four of the counties more than 75% of all television viewing is directed at Virginia stations; between 50% and 75% is directed at Virginia stations in three counties; and in two counties, between 25% and 50% is so directed. (JA 191-193); *Edge*, 732 F. Supp. at 641.[9] The Virginia newspapers serving this area transmit news stories about the

---

[9] The figures are: Camden County, 89%; Chowan and Currituck Counties, 68%; Dare County, 42%; Gates County, 82%; Hertford County, 74%; Northampton County, 28%; Pasquotank County, 76%; and Perquimans County, 82%. (JA 191-193).

lottery and lottery advertisements across state lines. (JA 195). Both Virginia and North Carolina newspapers also regularly report news and information pertaining to the Virginia lottery. (JA 196).

The statistics supporting the district court's findings of fact are set forth in detail in the preceding Statement of the Case. The only conclusion they permit is the one drawn by the district court. Censoring Edge accomplishes nothing as a practical matter because the North Carolinians in its service area are already saturated with material about the Virginia lottery.[10]

b. Petitioner also argues that the courts below ignored *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). (Petition at 14). This case stands for the proposition that it is permissible to distinguish between offsite billboard advertising and onsite billboard advertising when evaluating a facial challenge to an ordinance. The holding has no application here. First, the difference between offsite and onsite billboard advertising is obvious. Onsite advertising is site specific. Offsite advertising is virtually

[10] The district court stated:

> Application of Section 1304 to Edge can only speculatively advance the goals of North Carolina. Moreover, to the extent that that provision does reduce lottery participation by North Carolina residents, that reduction is necessarily so slight as to be the kind of "remote" support rejected in *Central Hudson* as not "directly advanc[ing]" either interests of federalism or limitations on lottery sales.

Edge v. United States, 732 F. Supp. at 640.

unlimited. It is axiomatic that limiting billboard advertising to specific sites would be effective in promoting governmental interests. Furthermore, *Metromedia* involved a facial rather than an as-applied challenge. The empirical data submitted in this case was not present in *Metromedia*.

c. Faced with a record that overwhelmingly proves section 1307's ineffectiveness when applied to Edge, Petitioner seeks to redefine *Central Hudson*'s direct advancement test. Petitioner decries empiricism; it contends that evidence should be eschewed and factual findings treated as irrelevant. Petitioner argues that a wholly ineffective restriction on commercial speech must nevertheless be upheld if one can postulate a "logical" relationship between the restraint and the policies sought to be advanced. (Petition at 16).

Petitioner's argument confuses a facial constitutional challenge with an as-applied challenge. While a logical relationship may be enough to sustain the former,[11] this Court has repeatedly emphasized the need for a detailed factual record when considering the latter. As Justice White wrote recently, "as a general proposition, we can arrive at informed judgments only when we have a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 776 n.4 (1988) (White, joined by Stevens and

[11] As support for its logical relationship test, Petitioner cites *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) and *Metromedia*. (Petition at 16). Both cases involved a *facial* challenge to statutes restricting commercial speech. They have no applicability to the instant case, which was tried on an as-applied theory.

O'Connor, dissenting). As-applied adjudication enables a court to decide no more than necessary to dispose of a specific case and to avoid unnecessary confrontations with Congress. *Id.* It rests on the time tested advisability of having concrete, rather than hypothetical, cases.

In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), this Court recognized the appropriateness of an as-applied challenge to regulations involving commercial speech. Justice Scalia, writing for the majority, stated:

> We remand this case for determination, pursuant to the standards described above, of the validity of this law's application to the commercial *and* noncommercial speech that is the subject of the complaint; and, if its application of speech *in either such category* is found to be valid, for determination whether its substantial overbreadth nonetheless makes it unenforceable.

Id. at 486 (emphasis added). He explained: "We must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest." *Id.* at 495. Justice Scalia further explained:

> The Court of Appeals did not decide, however, whether [the law] directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. As noted earlier, it remanded to the District Court for those determinations. We think that remand was correct, since further factual findings had to be made.

Id. Thus, in *Board of Trustees* this Court expressly directed courts to perform the exact type of empirical analysis

performed by the district judge in this case and approved by the panel majority. *See also Peel v. Attorney Registration and Discipline Comm'n*, 496 U.S. 91 (1990) (following *Central Hudson* in examining empirical evidence in record to sustain an as-applied challenge to a restriction on commercial speech).

In essence what the government is requesting is nothing less than a reversal of *Central Hudson*, a reversal of *Board of Trustees* and a rejection of "as applied" adjudication. The government suggests abandoning the tried and true, pragmatic empiricism of as-applied adjudication and substituting for that adjudication a blind reliance upon governmental dogma. On the record in this case there is no conceivable way to find empirical support for the proposition that the statutes as applied to Edge advance any governmental interest of any kind. The courts below correctly applied existing law, and there is no reason for further review.

2. The Inapplicability of *Posadas*

Petitioner condemns the Fourth Circuit for its failure to discuss *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). However, the district court carefully discussed *Posadas*, 732 F. Supp. at 643, and ruled that *Posadas* expressly confirms *Central Hudson*'s continuing vitality.

In *Posadas*, this Court rejected a *facial* challenge to a Puerto Rican law prohibiting casino gambling advertising directed at Puerto Ricans but not tourists. Because the challenge was facial, there was no empirical data in the

record concerning the effectiveness of the statute.[12] Considering Puerto Rico's island geography and isolated locale, and the narrowing construction placed on the law by the Puerto Rico Superior Court, the Court refused to hold that the ban on advertising could never further the government's interest. The Court did not abandon *Central Hudson*; indeed, it cited *Central Hudson* as the controlling authority. 478 U.S. at 340.

Three years after *Posadas* was decided, this Court rendered its decision in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The Court again endorsed *Central Hudson*'s four prong test and, more importantly, expressly remanded the case for an as-applied application of two of those four tests to the specific facts there involved. *Board of Trustees*, 492 U.S. at 475-76.

There is nothing in *Posadas* which suggests that this Court has abandoned the well-established notion that regulations infringing on speech must be effective in promoting a substantial governmental objective in order to be sustained. There is nothing in *Posadas* which suggests that this Court would sustain a regulation that prevents one speaker from saying that which all others similarly situated can say. *Posadas* stands for nothing more than the unsurprising proposition that a facial challenge to a statute based upon speculative and non-

[12] The procedural posture of *Posadas* confirms the lack of a factual record. The appeal was from the grant of a Motion to Dismiss. *Posadas*, 478 U.S. at 330.

evidentiary conclusions is difficult since courts do not go out of their way to strike down legislation.[13]

3. Congress May Not Arbitrarily Favor One Speaker Over Another

Petitioner's final argument for granting the writ masquerades as one of logical inconsistency. Petitioner begins with the premise that Congress could lawfully ban any commercial speech regarding lotteries. Petitioner then reasons that if a tota! ban is constitutional, a partial ban must also be upheld. Petitioner even goes so far as to call the contrary rulings below "perverse." (Petition at 20-21)

Petitioner's argument fails to consider the fact that a complete ban on lottery advertising affects all speakers equally whereas the partial ban creates favored and disfavored speakers.[14] The factual record established that

[13] Petitioner suggests that the restriction in *Posadas* was just as ineffective as the restriction involved in the instant case. (Petition at 19). This is pure speculation. As was noted above, no evidence was ever taken in *Posadas* because the case involved a facial challenge to Puerto Rico's restriction on gambling advertisements. (*Supra* at 13-14).

[14] Although the courts below relied solely on the first amendment, the equal protection guarantee of the due process clause of the fifth amendment also forbids Congress from using the city of licensure as a basis for deciding which radio station may broadcast Virginia lottery advertising and information.

In an analogous case, *Okla. Broadcasters Ass'n v. Crisp*, 636 F. Supp. 978 (W.D. Okla. 1985), the court found that an Oklahoma ban on alcoholic beverage advertising was not rationally related to the asserted state interest in preventing the artificial stimulation of a demand for alcoholic beverages. The law failed the

discrimination between the two classes was unjustified in this case. The North Carolina residents in Edge's broadcast area are inundated with advertisements for and information about the Virginia lottery. Virginia radio stations, television stations and newspapers make the Virginia lottery a fact of life in this area. All section 1307 did in this case was silence one voice among many.

A law which deprives selected persons of their right to free speech must actually accomplish something. If the law does not directly advance a legitimate governmental interest, it is nothing more than a naked abuse of power. The Constitution does not allow the government to decide arbitrarily who may and may not utter identical words to the same audience. Permitting such an abuse of power would be the truly "perverse" result.

---

rational relationship test because the state was already inundated with alcoholic beverage advertising, despite the ban. Because of the flood of advertising, a ban directed against in-state advertising had such an attenuated link to the State's goal that the classification was arbitrary and irrational. *Id.* at 992. Like Oklahoma did in banning in-state advertising of a legal product, the government has violated POWER 94's equal protection rights by suppressing its lottery-related speech while permitting others to speak freely.

CONCLUSION

For the reasons stated, Respondent Edge Broadcasting Company respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

CONRAD M. SHUMADINE
WALTER D. KELLEY, JR.
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510-2197
(804) 628-5500

Attorneys for Respondent
Edge Broadcasting Company

November, 1992